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NO. 89-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARJORIE A. EIMANN, et al.,
Petitioners

v.

SOLDIER OF FORTUNE MAGAZINE, INC., et al.,
Respondents

On Writ of Certiorari From the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the court of appeals' decision, purportedly made under color of state law, in truth invoke constitutional principles that define protections owed to commercial speech?

2. Does the court of appeals' decision, which immunizes a publisher for its gross negligence in disseminating commercial speech related to illegal activity, conflict with prior commercial speech decisions by this court?

3. Does the court of appeals give proper deference to the jury's finding of gross negligence for publishing a dangerous ad, when the court draws its own conclusion, contrary to that of the jury, that the publisher must have found the ad "ambiguous?"

LIST OF ALL PARTIES

Marjorie A. Eimann: Plaintiff-Petitioner (mother of Sandra Black).

Gary Wayne Black: Plaintiff-Petitioner (son of Sandra Black).

Soldier of Fortune Magazine, Inc.: Defendant-Respondent.

Omega Group, Ltd.: Defendant-Respondent.

Lexington Insurance Co.: Liability insurer of Soldier of Fortune Magazine, Inc.

Ronald G. Franklin, J. Graham Hill, John Roberson, and Deanna Livingston of Hill, Parker, Franklin, Cardwell & Jones, and Travis B. Bryan, III: Appellate and Trial Counsel for plaintiffs-petitioners.

E. Barrett Prettyman, Jr., John G. Roberts, Jr., David G. Leitch, and William P. Flanagan of Hogan & Hartson: Appellate counsel for defendants-respondents.

Larry D. Thompson and Lance Olinde of Lorance & Thompson, Robert M. Callagy of Satterlee, Stephens, Burke & Burke, and Robert B. Miller of Miller, Hale & Harrison: Trial counsel for defendants-respondents.

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On Writ of Certiorari From the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

To The Honorable Supreme Court:

Marjorie A. Eimann, individually, as next friend of Gary Wayne Black, and as representative of the estate of Sandra K. Black, deceased ("plaintiffs"), petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 880 F.2d 830 and is reproduced in Appendix A to this petition.

There was no formal opinion of the district court upon final judgment. The final judgment itself is reproduced in Appendix B.

An opinion overruling defendants' motion for summary judgment, written by the district court and published at 680 F. Supp. 863, is reproduced in Appendix C.

JURISDICTION

The judgment of the court of appeals (Appendix A, *infra*, 1a-9a) was entered on August 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Seventh Amendment to the Constitution provides as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial

by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

The parents and son of Sandra Black, the victim of a murder-for-hire scheme, brought this wrongful death action against the owner of Soldier of Fortune Magazine and its parent, Omega Group, Ltd. (jointly referred to as "SOF" or "the magazine"), claiming their gross negligence in publishing a classified "personal service" advertisement that was used to hire Sandra Black's killer, John Wayne Hearn. It is undisputed that Sandra Black's husband, Robert Black, contacted Hearn through the SOF ad and hired him to carry out the murder of his wife. T 2-78.

Lacking the will to murder his wife himself, Black had tried but failed to find someone in his hometown of Bryan, Texas to commit the crime for him. T 8-20, 8-35-38, 8-43-44, 8-51. Yet, by turning to the classified advertisements in the back pages of the September 1984 issue of SOF, he found the answer to his dilemma in personal service ads offering the services of persons willing to commit a variety of criminal acts. Px 132. Black chose Hearn's ad, which offered expertise as a "weapons specialist" available for "high risk assignments" in the "U.S. or overseas."[1] Black contacted Hearn by calling the number listed, prompting Hearn to

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1. The complete ad read:

EX-MARINES-67-69 'Nam Vets, Ex-DI, weapons specialist—jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas. (404) 991-2684.

Px 39, tab 83.

make his first trip ever to Bryan, Texas. T 2-71. During their first meeting, Black made veiled references to his desire for Hearn to murder his wife. T 2-74. Black and Hearn discussed the job in more detail over the ensuing months; Hearn eventually returned to Bryan on February 20, 1985 to carry out his mission and earn the agreed upon $10,000 fee. T 2-74-76.

Hearn's claim at one point in his trial testimony that he never intended to engage in criminal activities by placing his SOF ad conflicted with his admission that he and his partner "may have" discussed performing illegal acts before they submitted the ad for publication. T 2-81. In any event, Hearn's claim as to the legitimacy of the ad did not square with evidence of the overwhelming response the ad drew from SOF readers. This evidence of the effectiveness of the ad demonstrated the ad's true nature and purpose better than Hearn was willing himself to admit. Specifically, Hearn stated that the ad attracted calls twenty-four hours a day from SOF readers who solicited Hearn's "services" for every imaginable crime, including kidnapping, assault, jailbreaking, bombing, drug running, and even political assassination. T 2-57, 2-61-64. Of the average of fifteen to twenty calls Hearn received each day from the ad, *ninety percent* were requests for him to engage in criminal conduct. T 2-60. Incredibly, he received three to five calls per day from persons asking that he commit murder for money. T 2-60.

Hearn testified that, as a result of the effectiveness of these and other clasified ads in the magazine, he was unable to think of a single crime that either he or one of his fellow advertisers in SOF had not committed. T 2-106. Indeed, Hearn boasted that SOF "made [his] professional life possible." T 2-104. That professional life

included committing at least three murders in forty-five days, each for money and each solicited through the same ad in SOF. T 2-51, 2-77-78.

Neither the advertisement nor the incident were unique for the magazine. With its second issue in 1975, SOF began to include a wide assortment of "personal services" advertisements in its pages. Px 39. Robert K. Brown, the magazine's founder, sole owner, and publisher, actively promoted these ads because of his belief that they added "flavor and mystique" to the publication. T 2-236, 5-175-76, 7-49-52. The "flavor and mystique" came from ads like the following:

> MERC FOR HIRE. Anything, anywhere. Don't get mad, get even. Work alone, short term, discreet confidential. SKIPPER P.O. Box 546455, Surfside, FL 33154. [Px 39, tab 83].
>
> EX-MARINE, Vietnam vet, with devious, discreet mind seeks dirty work. Anything, anywhere. P.O. Box 41051, Chicago, IL 60641. [Px 39, tab 34].
>
> MR. EMPLOYER: Ex-Ranger, 3 years Vietnam, will do anything for money, from bodyguard to ? Call Earl (214) 579-0020, or write Earl M. Ward, 111 E. 7th St., Irving, TX 75060. [Px 39, tab 37].
>
> MERC FOR HIRE. Seeks dirty work, anything, anywhere. Discreet, devious mind. P.O. Box 30107, Chicago, IL 50630. [Px 39, tab 64].
>
> HUNTER, HIGH RISKS CONTRACTS. Phone Nate Blackstone (603) 542-2786. [Px 39, tab 83].[2]

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2. For the convenience of the court, a number of other ads from various issues of the magazine are collected and presented in Appendix D of this brief.

Additional "flavor" came from advertisements for an assortment of "how to" books, including THE DEATH DEALER'S MANUAL for "professional mechanics," HOW TO KILL,[3] and HIT MAN - A MANUAL FOR TECHNICAL CONTRACTORS.[4]

Even though the "flavor" of these ads obviously derived from their relation to crime, Brown took the position at trial that never in his "wildest dreams" did he or anyone else at SOF suspect prior to this case that any of the ads in the magazine might be connected with illegal activity. Brown's credibility on this point was a key issue at trial. He demonstrated his lack of credibility by refusing to concede even the most obvious ads. For example, when confronted with an ad that read:

> GENTLEMAN THAT IS BORED in peace is looking for a bit of excitement. Within the boundaries of law if possible; has nothing against "crime" if sufficiently interesting . . . Gentleman Peter, Box 15351, San Diego, CA 92115. [Px 39, tab 21],

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3. The preface to the book How To KILL states, "The object of this study is to instruct the reader in techniques of taking another human life, up close, and doing it well. You may well find this booklet offensive, repulsive, brutal, and vicious. It is meant to be. It is completely contemptuous of human life, and my only admonition to the would be assassin is: Kill without joy." P 123. Hearn, Sandra Black's killer, testified that he obtained this book through SOF and utilized it in his "endeavors." T 2-56. He found these and other books useful for the "information and instruction" they contained. T 2-56.

4. Px 123, 124, 125(c). Brown also carried ads for other products and services like plastic explosives, brass knuckle "paperweights," remail services, "emergency lockpicking technology," bullet proof body armor, kitchen improvised plastic explosives, silencers, Nazi memorabilia, butterfly knives, nitroglycerin "instructions", and autofire conversion manuals. Px 132.

Brown took the incredible position that simply because the words say "crime" "does not *ipso facto* mean that the gentleman is going to go out and commit a crime." T 2-177.

Plaintiffs offered proof that SOF understood the significance of more subtle language in the ads as well. Joan Steele, the advertising manager at SOF, testified in this regard that she recognized that a regular reader of the magazine would know that certain words have a "special meaning" in the context of SOF. For example, advertisements that offered the services of a "hunter" or "mechanic" unequivocally meant "gun for hire." T 5-166-67. More particularly pertinent to the Hearn ad, she ascribed the same meaning to the phrase "high risk assignments," the very words Hearn used. T 5-167.

Steele's insistence that, to her, "hired gun" always meant someone performing a *legal* occupation could hardly be squared with the overwhelming evidence that Steele and others at SOF knew that serious crimes were actually being solicited through the ads. Evidence of this came first from testimony concerning contacts the magazine staff had with law enforcement agencies long before the Hearn ad was run. SOF's executive editor, William Guthrie, admitted that the magazine received "frequent and ongoing" calls from the FBI and other investigating agencies inquiring about SOF's advertisers and expressing concern about the ads. T 7-62-63, 7-68. Joan Steele stated that she personally received two to three calls annually from law enforcement officials inquiring about the ads. T 5-177-78. Also, a New Jersey state police detective revealed that, more than a month before the Hearn ad was submitted for publication, he contacted Joan Steele and discussed the investigation of a crime

involving someone contacted through an SOF ad offering services for "high risk" operations. T 3-118-120. The detective testified that Steele assisted him in identifying the person who submitted the ad.

Plaintiffs also presented evidence of extensive press coverage specifically linking SOF advertisements with crimes actually committed before the Hearn ad was run. That coverage, including Associated Press (AP) and United Press International (UPI) reports, Denver newspaper stories, and even full page articles in Time and Newsweek, was relevant to the issue whether SOF carried the ads with knowledge of the true nature of the activity proposed. Included was evidence of an incident, widely reported in both Time and Newsweek, in which SOF staffers were contacted by prosecutors and asked to cooperate with the prosecution of a crime that was linked to an SOF advertiser. T 8-213-19. In compliance with prosecution requests, the managing editor of the magazine provided two signed and sworn affidavits that referred to the SOF ad. T 8-223-24. At trial, Brown denied that SOF staffers had any knowledge of the incident. T 8-174-79.

It was on the heels of these widely reported events that the staff of SOF urged Robert Brown in the Spring of 1984 to stop carrying the ads. Many of the staff believed that the sensational ads did not contribute to a proper image for the magazine. T 7-28. A meeting was held in March, two months before Hearn submitted his ad for publication, at which time Brown and his staff discussed what guidelines, if any, should be imposed on personal service and other classified advertisements. T 2-56, 5-137-38. Although every SOF staff member recommended to Brown that he stop running personal service ads altogether, T 3-92, 3-99, 7-52-54, Brown rejected

their advice and consciously chose to continue his policy of accepting the ads. T 3-99, 7-52.

Accordingly, in May 1984, when Hearn's advertisement reached the desk of the advertising manager, Joan Steele, Brown's policy favoring publication of the controversial ads remained in effect. Steele considered Hearn's ad "questionable," doubtlessly because she knew that Hearn's words "high risk assignments" meant "gun for hire." She showed the ad to her superior, William Guthrie, who, following Brown's policy, approved the ad and allowed it to be published. T 5-170-71.

Plaintiffs thus claimed at trial that SOF knew or should have known, based on the context of the Hearn ad and on the magazine's prior knowledge with regard to the others ads, that Hearn was proposing criminal activity. With this realization, plaintiffs asserted, SOF should have refrained from disseminating the Hearn ad to its readers. The jury agreed, finding that SOF was not merely negligent but grossly negligent in publishing the ad. The district court rendered judgment for actual and exemplary damages based on the jury verdict. (Appendix B, *infra*, pp. 25a-26a).

The Fifth Circuit reversed. (Appendix A, *infra*, p. 1a). In so doing, the court seemed to accept as a fact that SOF knew that its advertisements had previously been used to solicit crimes. Nevertheless, the court did not find the Hearn ad sufficiently clear in meaning to justify assessing liability for its publication. The court specifically expressed its view that the Hearn ad was "ambiguous" and presented a mere "possibility of illegal results." Because of its belief that requiring a publisher to refrain from publishing all "ambiguous" ads would be too onerous a burden, the court held that SOF owed no duty to plaintiffs in this instance.

REASONS FOR GRANTING THE WRIT

1. The decision below confers immunity upon a publisher of commercial speech that is related to illegal activity and thus conflicts with prior decisions by this Court.

A. The court of appeals' analysis, purportedly conducted under state law, in truth invokes the commercial speech doctrine.

In reaching its specific holding in this case—that SOF did not owe a duty to plaintiffs to refrain from publishing the Hearn ad—the court of appeals purported to conduct its analysis in the algebraic terms suggested by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). According to the so-called "Hand" equation, the existence of a duty turns on whether the burden of taking adequate precautions against a particular risk is less than the probability of harm, multiplied by the gravity of the resulting injury.

Upon applying the equation to the facts of this case, the court first acknowledged that the Hearn ad and other ads in the magazine, known to have resulted in at least three murders along with numerous other crimes, posed a substantial risk of serious harm to the public. As the court properly recognized, Sandra Black's murder itself illustrates the extreme risk created by publishing ads like Hearn's. The fact that other crimes are known to have been committed as a result of other similar ads proves that the chance of serious injury was not remote.

Yet, even while recognizing the extreme risk associated with the Hearn ad, the court, in concluding its analysis, nevertheless found the consequences of the risk insufficient

to outweigh the burden liability would place on the publisher in this case. Finding that burden too great to sustain, the court reversed the damages that resulted from SOF's conduct.

While the Fifth Circuit strained to fit its holding in this regard under the authority of state law, purporting to assess the scope of "duty" as that concept is defined under Texas law, it is clear that the analysis employed did not reflect views held by Texas courts. In fact, the "Hand" formula relied upon by the Fifth Circuit has never been applied or cited in Texas. Texas courts simply define the scope of the duty owed in negligence cases as "a duty to act as a reasonable prudent person would act under the same or similar circumstances considering the reasonably foreseeable risk or probability of injury to persons similarly situated as the plaintiff." *Bennett v. Span Industries, Inc.*, 628 S.W.2d 470, 473 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.). While many of the factors to be considered in determining what is "reasonable conduct" under a given set of circumstances are the same as those specified in the "Hand" equation, the assessment of the weight to be given each factor is a question for the jury and not for the court. *See Otis Engineering Corp. v. Clark*, 668 S.W.2d 307, 311 (Tex. 1983); *Thoreson v. Thompson*, 431 S.W.2d 341, 344 (Tex. 1968).[5]

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5. The district court, sitting in Texas and applying Texas law to this case, acknowledged the general duty in the state to act as a reasonable person would act under the same or similar circumstances, considering the foreseeability of risk and the probability of harm. *See* Appendix C, *infra*, 33a. Significantly, the court also held that whether a defendant acted reasonably under the circumstances is a question for the jury. *Id.*

The true basis for the court of appeals' decision in this case appears not to be an analysis of "duty" under Texas law, but rather the court's interpretation of the constitutional limits placed on assessing civil liability for commercial speech. While the court attempted to avoid announcing a constitutional framework for its decision, its ultimate holding reflects an intent to provide special protection to SOF because of its status as a publisher. Regardless of the label the court applies to its reasoning, it appears that the First Amendment was the principal inspiration for its ruling.

Significantly, the court of appeals looked directly to this Court's prior decisions with regard to commercial speech to support its assessment of the limits of liability that could be levied as a result of publication of the Hearn ad. In fact, the court demonstrated in its opinion that the determinative factor in its ultimate decision was its interpretation of prior decisions by this Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) and *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), and by the Fifth Circuit in *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983) (en banc), by which the commercial speech doctrine was given shape. By invoking these cases, the court of appeals demonstrated that notions it had about commercial speech—and specifically the court's perception of the high level of protection that commercial speech should be afforded —guided the court's hand in reaching its holding in this case.

Yet, the court's ultimate decision to immunize a publisher found guilty of gross negligence in publishing a highly dangerous illegal ad directly conflicts with this

Court's previous decisions. Nothing in the way this Court has defined the commercial speech doctrine justifies this result. In fact, this Court's commercial speech decisions demonstrate that the speech interests involved in this case deserve no special protection whatsoever.

B. The court of appeals erred in giving *any* weight to the interests inherent in the Hearn ad, given that the ad constitutes commercial speech related to illegal activity.

A key element in this Court's methodology for assessing the permissible limits of press liability in speech cases has been a recognition that not all categories of speech deserve the same degree of protection. The level of protection to be extended to speech in each given instance depends upon the type of speech involved and its relative value when balanced against the competing tort interest. *See Dun & Bradstreet v. Greenmoss Builders,* 472 U.S. 749, 756-57 (1985). Speech that is closest to the cherished values of the first amendment—"core speech"—receives the greatest protection; speech that is less directed to the goals fostered by the First Amendment receives less protection and may be more easily overcome by legitimate interests in tort recovery. *Id.* at 756-59.

Commercial speech—the type of speech involved here—lies at the outer limits of the protections the First Amendment confers on speech.[6] This Court extended those limits to include commercial speech only recently. *See*

6. There appears to be no dispute that the Hearn ad constituted pure commercial speech. The ad did not thrust Hearn or SOF into a debate of public issues. It contained no ideological content, nor was it "integrally related to the exposition of thought." *Virginia State Board of Pharmacy,* 425 U.S. at 779 (1976) (Stewart, J., concurring). Its sole effect was to propose a commercial transaction.

Virginia State Board of Pharmacy, 425 U.S. at 762 (holding for the first time that commercial speech is not "wholly" outside the protection of the first amendment). Even then, the Court stated and has repeatedly held since then that the level of protection enjoyed by the commercial speaker is substantially less than that extended to traditional "core" expression.[7]

Of course, the Hearn ad was not even innocent commercial speech. The jury found that the ad was commercial speech *related to criminal activity*. (R 195). From *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388-89 (1973), to *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982), this Court has held that commercial speech promoting an illegal activity enjoys no special protection whatsoever. *See Central Hudson*, 447 U.S. at 563-64 (1980). The holding stems from a recognition that speech related to illegal activity is valueless to the legitimate consumer. *See Id.* ("The First Amendment's concern for commercial speech is based on the informational function of advertising. Con-

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7. *See Central Hudson*, 447 U.S. at 562-63 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."); *Dun & Bradstreet*, 472 U.S. at 758 n.5 (1985) ("[T]he most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech . . . occupies a 'subordinate position in the scale of First Amendment values' . . . [I]t may be regulated in ways that might be impermissible in the realm of noncommercial expression."). *Cf. Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (billboards exhibiting commercial speech could be banned entirely, while those containing core expression deserved full constitutional protection); *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986) (assuming a sufficient state interest, a state is entitled to regulate or ban certain commercial speech entirely, even when such speech concerns a lawful activity and is not misleading or fraudulent).

sequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.") (citation deleted).

The jury's finding as to the illegality of the Hearn ad thus directly contradicts the court of appeals' conclusion that the commercial speech interests inherent in the ad outweigh the right of the plaintiffs to a wrongful death recovery. The ad, by which Hearn so successfully peddled his skills as a criminal, was of little value to consumers seeking legitimate services. Indeed, the evidence noted by the court of appeals, that Hearn obtained one lawful job through the ad, loses its significance when compared to Hearn's admission that "virtually all" of the employment he obtained through the ad was criminal in nature. T 2-60.[8]

Of course, this finding did not prevent the court of appeals from concluding, based apparently upon its own view of the evidence, that the Hearn ad was "ambiguous." This "finding" in turn led the court to hold that SOF could not be required to refrain from publishing "ambiguous" ads like Hearn's.

The court's holding in this regard presents the obvious initial problem of standard of review. As is discussed in greater detail in connection with the second point in this petition, the court of appeals was required to defer to the jury's findings with regard to subordinate facts so long as the findings were supported by any competent

8. That Hearn advertised his services in code used in the magazine, rather than in explicit terms like "murder for hire," hardly relieves the ad of its true character. As this Court stated in *Pittsburgh Press Co.*, 413 U.S. at 388, "The illegality in this case may be less overt, but we see no difference in principle here."

and substantial evidence. *Conan Properties, Inc. v. Conans Pizza, Inc.*, 752 F.2d 145 (1985). As mentioned previously, the evidence here demonstrated that SOF readers found nothing "ambiguous" about the Hearn ad, since the overwhelming response to the ad came in the form of persons seeking criminal services. Moreover, the staff of the magazine, like the readers, knew that Hearn's advertisement, expressing a willingness to perform "high risk assignments," had a special meaning. In the context of SOF, with the history of crimes solicited through similar ads, SOF simply could not reasonably assume that Hearn intended only legal occupations. It was on this basis, with the ad judged in full context and against the backdrop of SOF's prior knowledge about the ads, that the jury concluded that SOF reasonably could have interpreted the ad as a proposal for criminal activity.

The court stated in its opinion that the mere "possibility of illegal results" does not strip an ad of its commercial speech protection." (Appendix A, *infra*, at 15a). But this description does not fairly fit the Hearn ad, which drew an overwhelming response from people seeking criminal services. The ad, as a result of which "virtually all" of Hearn's employment was criminal in nature, and which made Hearn's "professional life possible," did not present a "mere possibility" of crime to the readers and should not have done so to SOF.

In fact, the evidence gave the jury a basis for concluding that SOF was "consciously indifferent" to whether the ad proposed illegal activity. The jury's "conscious indifference" finding reflected its conclusions as to SOF's state of mind with regard to the ad, and specifically demonstrated the jury's belief that Brown and the others

at the magazine knew about the connection with illegal activity but did not care. The jury could not have found this mental state if the ad had created merely a possibility of crimes. The jury obviously found the meaning of the ad, in its context and judged against the backdrop of past events, sufficiently clear to justify the "conscious indifference" finding.

The burden to be balanced against the substantial risk of serious harm posed by the ad thus need not be the burden the court perceived of discontinuing all personal service advertisements or even all "ambiguous" ads. Rather, it may be seen as the burden of refraining from publishing ads that, in their context, the magazine *knows or has substantial reason to know* are criminal solicitations. SOF violated that standard of care by publishing the Hearn ad.[9]

2. Given the court of appeals' failure to give deference to the jury's findings of subordinate facts, this court should intervene to protect the integrity of the right to a trial by jury.

The refusal of the court of appeals to respect the findings of the jury with regard to the key facts in this

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9. There is no reason derived from constitutional principles or public policy that would prevent a jury from assessing liability on the basis of what SOF reasonably should have known about Hearn's ad. In *Pittsburgh Press Co.*, 413 U.S. at 389, for example, this Court excluded ads from constitutional protection because the ads, "as embroidered by their placement," signaled that advertisers were *"likely"* to show an illegal sex preference in their hiring decisions. In *Central Hudson*, 447 U.S. at 563, the Court held that government may lawfully ban forms of communication, including commercial speech, that is *"more likely* to deceive the public than inform it." Even when dealing with elevated forms of speech, as in defamation cases like *Herbert v. Lando*, 441 U.S. 153 (1979), the Court has sanctioned civil liability for publishers when they obtain information giving them "reason to suspect" that material is false, even when the material "appears to be true." *Id.* at 160.

case and the action of the court in substituting its own view of the evidence for that of the jury cannot be justified. Under its own Fifth Circuit authority, the court was limited in its power of review to overturning only those factual conclusions which no reasonable juror could have reached. *Pan Eastern Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1129 (5th Cir. 1988). Although it could consider all the evidence in its analysis, it was required to make all reasonable inferences from the evidence in support of the verdict, *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1371 (5th Cir. 1982) (en banc), and was required to respect the ability of the jury to determine the credibility of the witnesses. *Boeing Co. v. Shipman*, 411 F.2d 365, 373-75 (5th Cir. 1969).

This standard did not change as a result of SOF's allegations of First Amendment interests in this case. Even in a case involving issues of constitutional magnitude, an appellate court is not permitted to abrogate the role of the jury in finding subordinate facts. Here, again, the court must defer to the factfinder's "opportunity to observe the demeanor of the witnesses." *Harte-Hanks, Inc. v. Connaughton*, 491 U.S. ___, 105 L.Ed.2d 562, 589 (1989) (quoting *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499-500 (1984)).

The key point in the court of appeals' analysis of the issues in this case was the court's conclusion that SOF could not have known the true nature of the "ambiguous" Hearn ad. This holding reflected the court's assumptions as to SOF's state of mind with regard to the ad. The court failed to acknowledge, however, that the jury had formed its *own* conclusion as to SOF's mental state. Specifically, by finding the magazine guilty of gross

negligence, the jury had determined that SOF's awareness with regard to the Hearn ad was so high that those at the magazine were *consciously indifferent* to whether the ad related to crime. The court of appeals omitted this finding from its analysis and thus failed to give the finding the deference it deserved.

The Seventh Amendment protects the right to a trial by jury in civil cases and greatly restricts the power of the appellate court to alter or ignore findings by the jury. The Fifth Circuit has recognized the Seventh Amendment's proscriptions in previous cases. *See, e.g., Granberry v. O'Barr*, 866 F.2d 112, 113 (5th Cir. 1988); *Gross v. Black & Decker (U.S.), Inc.*, 695 F.2d 858, 865 (5th Cir. 1983). By its holding in this case, however, the court strays from its obedient path. This Court should intercede to ensure that the Seventh Amendment protections remain undiminished.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HILL, PARKER, FRANKLIN,
CARDWELL & JONES

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APPENDIX A

Marjorie A. EIMANN, Individually, as Next Friend of Gary Wayne Black, and as Representative of the Estate of Sandra Kay Black, Deceased, and Glenn G. Eimann,
Plaintiffs-Appellees,

v.

SOLDIER OF FORTUNE MAGAZINE, INC. and Omega Group, Inc.,
Defendants-Appellants.

No. 88-2499.

United States Court of Appeals,
Fifth Circuit.

Aug. 17, 1989.

Son and mother of murder victim brought wrongful death action against magazine that published personal services classified advertisement for ex-Marines willing to take "high risk assignments," through which victim's husband hired assassin to kill her, and against magazine's parent corporation. The United States District Court for the Southern District of Texas at Houston, David Hittner, J., entered judgment on $9.4 million jury verdict for plaintiffs, and magazine appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that under Texas risk-utility analysis, magazine did not violate required standard of conduct by publishing advertisement.

Reversed and rendered.

See also 680 F.Supp. 863.

Appeal from the United States District Court for the Southern District of Texas.

Before GARWOOD, JOLLY and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Soldier of Fortune Magazine, Inc. appeals a $9.4 million jury verdict against it in a wrongful death action brought by the son and mother of a murder victim. The jury found that Soldier of Fortune acted with negligence and gross negligence in publishing a personal services classified advertisement through which the victim's husband hired an assassin to kill her. We reverse the judgment entered on the jury's verdict.

I. FACTS

John Wayne Hearn shot and killed Sandra Black at the behest of her husband, Robert, who offered to pay Hearn $10,000 for doing so. Robert Black contacted Hearn through a classified advertisement that Hearn ran in Soldier of Fortune Magazine, Inc. (SOF), a publication that focuses on mercenary activities and military affairs.

The ad, which ran in the September, October and November 1984 issues of SOF, read:

> EX-MARINE—67-69 'Nam Vets, Ex-DI, weapons specialist—jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas. (404) 991-2684.

Hearn testified that "Ex-DI" meant ex-drill instructor; "M.E." meant multi-engine planes; and "high risk assignments" referred to work as a bodyguard or security specialist. Hearn testified that he and another former

Marine placed the ad to recruit Vietnam veterans for work as bodyguards and security men for executives. Hearn's partner testified that they also hoped to train troops in South America. This partner never participated in any ad-related jobs and quit the venture shortly after the ad first ran.

Hearn and his partner testified that they did not place the ad with an intent to solicit criminal employment. However, Hearn stated that about 90 percent of the callers who responded to the ad sought his participation in illegal activities including beatings, kidnappings, jail-breaks, bombings and murders. It also generated at least one lawful inquiry from an oil conglomerate in Lebanon seeking ten bodyguards; Hearn received a commission for placing seven men with the company.

Between early 1982 and January 1984, Black had asked at least four friends or coworkers from Bryan, Texas to kill Sandra Black or help him kill her. All four refused. Black called Hearn in October 1984 after seeing his ad in SOF.

Hearn testified that his initial conversations with Black focused on Black's inquiries about getting bodyguard work through Hearn. In later calls they discussed the sale of Black's gun collection to Hearn. Hearn testified that he traveled from his home in Atlanta to Black's home in Bryan on January 9, 1985 to look at Black's gun collection. Hearn stated that Black discussed his plans for murdering his wife during the meeting and "hinted" that he wanted Hearn to participate, but did not ask Hearn directly to kill his wife. Hearn did not act on the hint and returned to Atlanta.

Black called Hearn repeatedly after Hearn returned to Atlanta. During one call Black spoke with Hearn's girlfriend, Debbie Bannister. Hearn and Bannister met after she called him in response to his SOF ad.

Black proposed directly that Hearn kill his wife during the call to Bannister. She passed the proposal on to Hearn, who called Black and said he would consider doing it. The two talked by phone several times in the following weeks. After an aborted murder attempt about three weeks later—during which Hearn was to help Black himself kill his wife—Hearn killed Sandra Black on February 21, 1985. By that time Hearn also had killed the ex-husband of Bannister's sister on January 6, 1985 and Bannister's husband on February 2, 1985.

Neither Hearn, who was sentenced to concurrent life sentences for the murders, nor his partner had criminal records when they placed their ad in SOF. Neither had received a dishonorable discharge from the Marines. Further, Hearn included his real name and correct address in submitting the ad to SOF; the ad itself listed Hearn's correct home telephone number.

Sandra Black's son, Gary Wayne Black, and her mother, Marjorie Eimann, sued SOF and its parent, Omega Group, Ltd., for wrongful death under Texas law on the theory that SOF negligently published Hearn's classified ad.

Eimann introduced into evidence about three dozen personal service classified ads selected from the 2,000 or so classified ads that SOF had printed from its inception in 1975 until September 1984. Some ads offered services as a "Mercenary for Hire," "bounty hunter" or "mechanic"; others promised to perform "dirty work", "high risk contracts" or to "do anything, anywhere at the right price."

Eimann presented evidence that seven and perhaps as many as nine classified ads had been tied to crimes or criminal plots. Eimann introduced stories from sources including the Associated Press, United Press International, *The Rocky Mountain News, The Denver Post, Time* and *Newsweek* that reported on links between SOF classified ads and at least five of these crimes.

Eimann also presented evidence that law enforcement officials had contacted SOF staffers during investigations of two crimes linked to SOF personal service classifieds. In one case, SOF had provided correspondence from its files—along with two affidavits signed by SOF's managing editor—that were used in the 1982 criminal trial of a Houston man who was convicted of soliciting the murder of his wife; during his effort the man had tried to hire a poisons expert by placing a classified ad in the October 1981 issue of SOF. Eimann also presented testimony from a New Jersey detective, who stated that in April 1984, SOF's advertising manager had helped him to identify a man who placed a classified ad in SOF.

In addition, Eimann presented expert testimony from Dr. Park Dietz, a forensic psychiatrist who had studied SOF, its ads and readership. Dietz testified that an average SOF subscriber—a male who owns camouflage clothing and more than one gun—would understand some phrases in SOF's classified ads as solicitations for illegal activity given the "context" of those ads.

That context included other classified ads in SOF, display ads for semiautomatic rifles and books with titles such as "How to Kill", and SOF articles including "Harassing the Bear, New Afghan Tactics Stall Soviet Victory," "Pipestone Canyon, Summertime in 'Nam and the

Dyin' was Easy," and "Night Raiders on Russia's Border." Dietz also described his visit to a SOF convention in summer 1987, where he photographed exhibits of weapons and tactical gear.

Based on his studies, Dietz concluded that the Hearn ad "or any other personal service ad in Soldier of Fortune in 1984 foreseeably is related to the commission of domestic crimes." He suggested that classified ads such as Hearn's would not carry such connotations if they appeared in Esquire or Vanity Fair.

Dietz conceded, however, that he had abandoned an effort to distinguish lawful SOF classified ads from criminal ones on the basis of specific code words such as "gun for hire," "mechanic" and "hunter" because some ads were too ambiguous to assign an illegal meaning to them with any certainty. He also noted that crimes had been linked to SOF classified ads that "seemed relatively innocuous." For example, one ad tied to a kidnapping and extortion plot read:

> Recovery and collection. International agents guarantee results on any type of recover[y]. Reply to Delta Enterprises, P.O. Box 5421, Rockford, Illinois 61125.

As Dietz stated, "The code system doesn't work."

SOF relied primarily on the testimony of its president, Robert K. Brown, who stated he did not know or suspect in 1984 that some of the SOF classified ads had been linked to criminal plots. Other SOF staffers and readers echoed these denials. SOF's advertising manager, Joan Steele, testified that she understood the phrase "high risk assignments" in Hearn's ad to mean "gun for hire," but

in the sense of a professional bodyguard or security consultant rather than a contract killer.

The district court's first special interrogatory asked the jury whether Hearn's ad "related to" illegal activity. The court's second interrogatory asked, "Did [SOF] . . . know or should it have known from the face or the context of the Hearn advertisement that the advertisement could reasonably be interpreted as an offer to engage in illegal activity?"

The court's instructions charged SOF with knowledge that Hearn's ad reasonably could be interpreted as such an offer when (1) the relation to illegal activity appears on the ad's face; or (2) "the advertisement, embroiled by its context, would lead a reasonable publisher of ordinary prudence under the same or similar circumstances to conclude that the advertisement could reasonably be interpreted" as an offer to commit crimes. The court went on to define "context" as the magazine's (1) "nature"; (2) other advertisements; (3) articles; (4) readership; and (5) knowledge, if any, that other advertisements in the magazine could reasonably be interpreted as an offer to engage in illegal activity.

The jury answered "yes" to the first two interrogatories, and found that SOF's negligence was a proximate cause of Sandra Black's death in response to Interrogatory Three. The court then asked the jury whether SOF's negligence constituted "gross negligence," defined as "conscious indifference." The jury answered "yes" to this interrogatory as well. The jury awarded Eimann $1.9 million in compensatory damages and $7.5 million in punitive damages; the district court entered judgment on the verdict. SOF appeals.

II. ANALYSIS

A. *Overview*

Eimann presented this case as a straight-forward negligence action revolving around one primary issue: whether SOF knew or should have known from the face or context of Hearn's ad that it represented an offer to perform illegal acts. Based on evidence that SOF knew of links between other classified ads and other criminal plots, she contends that SOF owed a duty to recognize ads such as Hearn's that reasonably might be interpreted as criminal solicitations and refrain from publishing them.

SOF argues first that no liability can attach under these facts because the criminal activities of Hearn and Robert Black, rather than Hearn's ad, were the proximate cause of Sandra Black's murder. SOF also argues that imposition of tort liability here contravenes first amendment protection for commercial speech because (1) the judgment below impermissibly imposed a duty on publishers to investigate its advertisers and their ads; and (2) the district court's all-encompassing definition of "context", combined with Dietz's testimony, allowed the jury to penalize SOF for the mercenary and military focus of the magazine's articles and other ads.

We need not address SOF's first amendment attacks on the judgment to resolve this appeal.[1] Assuming without

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1. SOF asserts primarily that this case involves protected commercial speech; it argues further that the district court's broad definition of "context" and Eimann's emphasis on the mercenary focus of SOF's ads and articles amounted to impermissible content distinctions in violation of first amendment principles. See, e.g., *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S. Ct. 1722, 95 L.Ed.2d 209 (1987); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 536, 100 S. Ct. 2326, 2332-33, 65 L.Ed.2d 319 (1980). For their part, the Amici Curiae arguing on SOF's behalf contend

deciding that a Texas court would apply general negligence principles to this case, we conclude that no liability can attach under these principles as a matter of law. SOF owed no duty to refrain from publishing a facially innocuous classified advertisement when the ad's context —at most—made its message ambiguous.

Under Texas law, negligence liability requires the existence of a duty, breach of that duty, and an injury proximately resulting from that breach. *City of Gladewater v. Pike*, 727 S.W.2d 514, 517 (Tex. 1987). The existence of a duty presents a threshold question of law for the court; the jury determines breach and proximate cause only after the court concludes that a duty exists. See *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983); *Abalos v. Oil Dev. Co.*, 544 S.W.2d 627, 633 (Tex. 1976). Our resolution of this case hinges on the initial duty question.

B. *Duty*

In essence, a duty represents a legally enforceable obligation to conform to a particular standard of conduct. W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 53 at 356 (5th Ed. 1984). Whether the defendant in a negligence action owes a duty

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that the district court erred in applying a negligence standard to a case that arguably involves commercial speech. See *Goldstein v. Garlick*, 65 Misc. 2d 538, 218 N.Y.S.2d 370, 374 (Sup. Ct. 1971) (publication of false ad actionable only if published maliciously, with intent to harm, or in reckless disregard of the ad's consequences); but see *South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc.*, 676 F.Supp. 346 (D. D.C. 1987); *Norwood v. Soldier of Fortune Magazine, Inc.*, 651 F.Supp. 1397, 1398-1402 (W.D. Ark. 1987). We need not confront these issues given our conclusion that no liability attaches here even if the court below properly applied negligence law to a commercial speech case and properly defined the "context" used to evaluate SOF's actions.

involves consideration of two related issues: (1) whether the defendant owes an obligation to this particular plaintiff to act as a reasonable person would in the circumstances; and (2) the standard of conduct required to satisfy that obligation. Id.

Texas courts have applied risk-utility balancing tests in resolving both aspects of the duty question. Thus, in deciding whether an actor owes a duty of reasonable care to the public at large, the Supreme Court of Texas has weighed the risk, foreseeability and likelihood of injury from certain conduct against the conduct's social utility and the burden of guarding against injury. See *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983) (employer who exercises control over incapacitated employee owes duty of reasonable care to prevent employee from creating unreasonable risk of harm to the public).

Similarly, Texas courts have applied risk-utility analysis in determining the second duty issue—whether a defendant who owes an established duty of reasonable care to specified parties must take precautions against particular dangers. See *Hendricks v. Todora*, 722 S.W.2d 458, 461 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (duty of reasonable care did not require lessee restaurant or its lessor to protect business invitee customers against drunken driver who crashed into restaurant's waiting area). Courts have described this aspect of duty as the defendant's obligation to protect those parties against unreasonable risks. Id.; see *Prosser & Keeton*, supra, § 31. A risk becomes unreasonable when its magnitude outweighs the social utility of the act or omission that creates it. *Hendricks*, 722 S.W.2d at 461; *Restatement (Second) of Torts* § 291 (1965).

Our analysis here assumes that SOF owes a duty of reasonable care to the public; we focus on the second prong of the duty issue: whether SOF's decision to print Hearn's ad violated the standard of conduct.

In answering this question we look to Judge Learned Hand's concise expression of these balancing principles in *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947). As he described it in algebraic terms, liability turns on whether the burden of adequate precautions, B, is less than the probability of harm, P, multiplied by the gravity of the resulting injury, L. In other words, an actor falls below the standard of conduct and liability attaches when B is less than PL. Conversely, the actor satisfies the obligation to protect against unreasonable risks when the burden of adequate precautions—examined in light of the challenged action's value—outweighs the probability and gravity of the threatened harm. See *Prosser & Keeton, supra* § 31 at 173; *Restatement (Second) of Torts* § 291; *Hendricks*, 722 S.W.2d at 461.

We now turn to these individual factors.

1. The Probability and Gravity of the Threatened Harm

In assessing the threatened harm we note that "nearly all human acts . . . carry some recognizable but remote possibility of harm to another." *Prosser and Keeton, supra*, § 31 at 170. The SOF classified ads presented more than a remote risk. Of the 2,000 or so personal service classified ads that SOF printed between 1975 and 1984, Eimann's evidence established that as many as nine had served as links in criminal plots. Of these nine, the evidence revealed that SOF staffers had participated in at least two police investigations of crimes in which classified

ads played a role; other crimes tied to the ads received varying amounts of media coverage.

As noted above, the gravity of the threatened harm may require precautions against even unlikely events. Id. For example, the standard of care may require those who own oil storage tanks to take precautions against fires caused by an unpredictable lightning strike. See, e.g., *Tex-Jersey Oil Corp. v. Beck*, 292 S.W.2d 803, 807-09 (Tex. Civ. App.—Texarkana 1956), aff'd in part and rev'd in part on other grounds, 157 Tex. 541, 305 S.W. 2d 162 (Tex. 1957), overruled on other grounds in *Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983). The prospect of ad-inspired crime represents a threat of serious harm. Eimann presented evidence that SOF classified ads played a role in other crimes ranging from extortion to jailbreaks. Sandra Black's murder illustrates one aspect of the crime linked to SOF classified advertisements.

2. The Burden of Preventing the Harm

SOF contends that the standard of conduct applied by the district court impermissibly required the magazine to guard against criminal solicitation by investigating its advertisers and their ads. It relies on a series of cases holding that newspaper publishers owe no duty in tort to investigate their advertisers for the accuracy of ads placed for publication. See *Pittman v. Dow Jones & Co.*, 662 F.Supp. 921, 923 (E.D. La. 1987).

However, in our view the standard of conduct against which the jury measured SOF's actions was more exacting than a duty to investigate; it requires publishers to recognize ads that "reasonably could be interpreted as an offer

to engage in illegal activity" based on their words or "context" and refrain from printing them. Based on evidence that SOF knew other ads had been tied to crimes, Eimann's counsel contended at oral argument that SOF should have refrained from publishing Hearn's ad and all other personal service classified ads—suggestive ones and bland ones alike. This represents an especially heavy burden given (1) the ambiguous nature of Hearn's ad; and (2) the pervasiveness of advertising in our society.

At most, the evidence reveals that Hearn submitted a facially innocuous ad. Standing alone, the phrase "high risk assignments" plausibly encompassed Hearn's professed goal of recruiting candidates for bodyguard jobs. Hearn performed precisely that function for at least one client who contacted him through the ad.

Eimann's effort to portray Hearn's ad as a readily identifiable criminal solicitation falls with Dr. Dietz's repudiation of his effort to identify specific code words signalling criminal intent. At one point in his testimony, Dr. Dietz analyzed a classified ad from the February 1980 issue of SOF. In terms that parallel Hearn's ad, this 1980 ad recruited SOF readers for "exciting high risk undercover stateside work". A court later convicted the individual who submitted it of mailing a threatening communication after he sent a letter instructing someone who had responded to the ad to "terminate" a person in Oklahoma City. Dr. Dietz stated:

> In 1984, in my opinion, someone familiar with the classified ads that have been run for years in Soldier of Fortune would be able to recognize from that ad that *this is possibly someone who would be willing to be involved in criminal activity; but they might*

> *be wrong when they thought that.* We knew that sometimes there were honest advertisers, and we know that some of the readers who responded to ads were honest too (emphasis added).

Dr. Dietz's description applies with equal force to Hearn's ad. Its bare terms reveal no identifiable offer to commit crimes, just as a locksmith's ad in the telephone directory reveals nothing about that particular advertiser's willingness to commit burglaries or steal cars.

This ambiguity persists even if we assume that SOF knew other ads had been tied to criminal plots. No evidence linked the other ads and crimes to Hearn. And as Eimann conceded, even if SOF had investigated Hearn and his partner in 1984, it would have discovered no criminal records and no false information that might have aroused suspicion.

Further, Eimann's heavy reliance on "context" cannot compensate for the fundamental ambiguity of Hearn's ad even if we assume that the district court properly defined that context. The presence in SOF of other ads and articles with violent themes provides no realistic method for gauging the likelihood that a particular ad will foster illegal activity. Do ads touting high-performance cars become solicitations for illegal activity when buyers drive them beyond the speed limit? Only when the ads run in *Car and Driver* magazine? Or, only when the ads run in magazines that also contain ads for radar detectors?

While we do not reach SOF's first amendment arguments, the Supreme Court's recognition of limited first amendment protection for commercial speech nonetheless highlights the important role of such communication for purposes of risk-benefit analysis. As the Court has noted,

"[T]he particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . ." Id. at 763. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764, 96 S. Ct. 1817, 1827, 48 L.Ed.2d 346 (1976). The Supreme Court's subsequent emphasis on the states' interest in regulating commercial speech neither erases this first amendment protection nor alters the fact that advertising is a part of daily life. See *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980); *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 106 S. Ct. 2968, 92 L.Ed.2d 266 (1986).

Eimann seeks to discount the importance of SOF's classified ads by stressing that (1) SOF's publisher promoted the ads because they added to the "flavor and mystique" of the magazine; and (2) the jury found that Hearn's ad "relate[d] to" illegal activity. She notes that the Supreme Court has excluded advertising of illegal activity from the scope of first amendment protection. See *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 388-89, 93 S. Ct. 2553, 2560-61, 37 L.Ed.2d 669 (1973) (newspaper's placement of help-wanted ads in sex-segregated columns violated anti-discrimination ordinance; "Any First Amendment interest which might have been served by advertising an ordinary commercial product . . . is altogether absent when the commercial activity itself is illegal. . . .") However, in the constitutional arena we have noted that the possibility of illegal results does not necessarily strip an ad of its commercial speech protection.

In *Dunagin v. City of Oxford,* 718 F.2d 738 (5th Cir. 1983) (en banc), this court upheld the constitutionality of a Mississippi law that banned liquor advertising by local, in-state media on grounds that the ban was no broader than necessary to advance the goal of promoting prohibition in the state's dry counties. See *Central Hudson,* 447 U.S. at 566, 100 S. Ct. at 2351. But in doing so the court rejected arguments that liquor advertising necessarily related to unlawful activity in Mississippi—even though nearly half of Mississippi's counties are dry, and even though wet counties prohibit alcohol consumption in places such as public schools and colleges. The court stated,

> The commercial speech doctrine would disappear if its protection ceased whenever the advertised produce might be used illegally. Peanut butter advertising cannot be banned just because someone might someday throw a jar at the presidential motorcade.

Dunagin, 718 F.2d at 743.

Similarly, a standard of conduct that imposes tort liability whenever the advertised product "could reasonably be interpreted as an offer to engage in illegal activity"—or might "relate to" criminal conduct—imposes an especially heavy burden. The comments of a court faced with a duty-to-investigate claim apply here:

> For the law to permit such exposure to those in the publishing business who in good faith accept paid advertisements for a myriad of products would open the doors "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."

Yuhas v. Mudge, 129 N.J. Super. 207, 322 A.2d 824 (App. Div. 1974) (citation omitted) (publisher owes no duty to investigate safety of "inherently dangerous" products advertised in its publication). Relatedly, the publication's editorial content would surely feel the economic crunch from loss of revenue that would result if publishers were required to reject all ambiguous advertisements. See *Walters v. Seventeen Magazine*, 195 Cal. App. 3d 1119, 241 Cal. Rptr. 101, 103 (1987).

3. Balancing the Burdens and Risks

We conclude that the standard of conduct imposed by the district court does not strike the proper balance between the risks of harm from ambiguous advertisement and the burden of preventing harm from this source under these facts. The appreciable risk that ads such as Hearn's will cause harm, combined with the gravity of that harm, does not outweigh the onerous burden Eimann asks us to endorse.

Hearn's ad presents a risk of serious harm. But everyday activities, such as driving on high-speed, closed access roadways, also carry definite risks that we as a society choose to accept in return for the activity's usefulness and convenience. See *Restatement (Second) of Torts* § 291 comment e at 56 (1965). To take a more extreme example, courts have almost uniformly rejected efforts to hold handgun manufacturers liable under negligence or strict liability theories to gunshot victims injured during crimes, despite the real possibility that such products can be used for criminal purposes. See *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1275 (5th Cir. 1985) (applying Louisiana law); *Armijo v. Ex Cam, Inc.*, 656 F.Supp. 771, 775 (D. N.M. 1987) (applying New Mexico law);

Caveny v. Raven Arms Co., 665 F.Supp. 530, 536 (S.D. Ohio 1987) (applying Ohio law); *Patterson v. Gesellschaft*, 608 F.Supp. 1206 (N.D. Tex. 1985) (applying Texas law). Given the pervasiveness of advertising in our society and the important role it plays, we decline to impose on publishers the obligation to reject all ambiguous advertisements for products or services that might pose a threat of harm.

III. CONCLUSION

The standard of conduct imposed by the district court against SOF is too high; it allows a jury to visit liability on a publisher for untoward consequences that flow from his decision to publish any suspicious, ambiguous ad that might cause serious harm. The burden on a publisher to avoid liability from suits of this type is too great: he must reject *all* such advertisements.

The range of foreseeable misuses of advertised products and services is as limitless as the forms and functions of the products themselves. Without a more specific indication of illegal intent than Hearn's ad or its context provided, we conclude that SOF did not violate the required standard of conduct by publishing an ad that later played a role in criminal activity.

The judgment of the district court is REVERSED and RENDERED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CA NO. H-87-0030

MARJORIE A. EIMANN, INDIVIDUALLY, AS NEXT FRIEND OF GARY WAYNE BLACK, AND AS REPRESENTATIVE OF THE ESTATE OF SANDRA KAY BLACK DECEASED,
Plaintiffs

v.

SOLDIER OF FORTUNE MAGAZINE, INC. AND OMEGA GROUP, LTD.,
Defendants

(Filed March 22, 1988)

FINAL JUDGMENT

BE IT REMEMBERED that on the 16th day of February, 1988, came on to be heard the above entitled and numbered cause, wherein Marjorie A. Eimann, individually and as representative of the estate of Sandra Kay Black, and Gary Wayne Black were plaintiffs, complaining of defendants, Soldier of Fortune Magazine, Inc. and Omega Group, Ltd. The parties appeared through their respective attorneys of record and announced ready for trial, and six good and lawful jurors were duly impanelled and the case proceeded to trial. At the conclusion of evidence, the court submitted the case to the jury on special interrogatories on March 1, 1988. On March

3, 1988, after due consideration, the jury returned its verdict as follows:

Interrogatory 1:

Did the Hearn advertisement relate to illegal activity?

Answer "Yes" or "No"

Answer: Yes

Interrogatory 2:

Did the Omega Group, Ltd. and Soldier of Fortune Magazine, Inc., acting through their staff or employees, know or should they have known from the face or the context of the Hearn advertisement that the advertisement could reasonably be interpreted as an offer to engage in illegal activity?

You are instructed that a publisher is charged with knowledge that an advertisement could reasonably be interpreted as an offer to engage in illegal activity (1) when the relation to illegal activity appears on the face of the advertisement itself, or (2) when the advertisement, embroiled by its context, would lead a reasonable publisher of ordinary prudence under the same or similar circumstances to conclude that the advertisement could reasonably be interpreted as an offer to engage in illegal activity. The "context" that you may consider includes the nature of the magazine; its other advertisements and articles; the nature of its readership; and the magazine's knowledge, if any, that other advertisements in the magazine could be reasonably interpreted as an offer to engage in illegal activity.

Answer "Yes" or "No"

Answer: Yes

Interrogatory 3:

Did the negligence, if any, of the Omega Group, Ltd. and Soldier of Fortune Magazine, Inc., acting through their staff or employees, proximately cause Sandra Black's death?

"Negligence" means failure to use ordinary care, that is, failure to do that which a magazine publisher of ordinary prudence would have done under the same or similar circumstances or doing that which a magazine publisher of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care" means that degree of care that would be used by a magazine publisher of ordinary prudence under the same or similar circumstances.

"Proximate cause" means that cause which in a natural and continuous sequence produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a magazine publisher using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event, but if an act or omission of any person, not a party to this suit, was the "sole proximate cause" of an event, then no act or omission of any other party could have been a proximate cause.

You are further instructed that it is not required that the particular event complained of should have been foreseen. All that is required is that the event be of such a general character as might reasonably have been anticipated.

Answer "Yes" or "No"

Answer: Yes

If, in answer to Interrogatory 3, you have found that the negligence of the Omega Group, Ltd. and Soldier of Fortune Magazine, Inc. proximately caused the occurrence in question, then answer Interrogatory 4. Otherwise, do not answer Interrogatory 4.

Interrogatory 4:

Was such negligence of the Omega Group, Ltd. and Soldier of Fortune Magazine, Inc. "gross negligence?"

"Gross negligence" means such an entire want of care as to show that the act or omission in question was a result of conscious indifference to the rights, welfare, or safety of the persons affected by it.

Answer "Yes" or "No"

Answer: Yes

If, in answer to Interrogatory 3, you have found that the negligence of the Omega Group, Ltd. and Soldier of Fortune Magazine, Inc. proximately caused the occurrence in question, then answer Interrogatories 5 and 6. Otherwise, do not answer Interrogatories 5 and 6.

Interrogatory 5:

What sum of money, if paid now in cash, would fairly and reasonably compensate Gary Wayne Black for his damages, if any, resulting from the death of Sandra Black?

Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element.

Element a. Pecuniary loss.

"Pecuniary loss" means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value, that Gary Wayne Black would, in reasonable probability, have received from Sandra Black had she lived.

Element b. Loss of companionship and society.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that Gary Wayne Black would, in reasonable probability, have received from Sandra Black had she lived.

Element c. Mental anguish.

"Mental anguish" means the emotional pain, torment, and suffering experienced by Gary Wayne Black because of the death of Sandra Black.

In determining damages for elements b and c, you may consider the nature of the relationship between Gary Wayne Black and Sandra Black, and their common interests and activities. You are reminded that elements b and c, like the other elements of damages, are separate, and, in awarding damages for one element, you should not include damages for the other.

Answer, with respect to the elements listed above, in dollars and cents for damages that:

Were sustained in the past:

Answer: $500,000

In reasonable probability will be sustained in the future:

Answer: $1,000,000

Interrogatory 6:

What sum of money, if paid now in cash, would fairly and reasonably compensate Marjorie Eimann for her damages, if any, resulting from the death of Sandra Black?

Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element.

Element a. Pecuniary loss.

"Pecuniary loss" means the loss of the care, services, advice, and counsel of a pecuniary value that Marjorie Eimann would, in reasonable probability, have received from Sandra Black had she lived.

Element b. Loss of companionship and society.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that Marjorie Eimann would, in reasonable probability, have received from Sandra Black had she lived.

Element c. Mental anguish.

"Mental anguish" means the emotional pain, torment, and suffering experienced by Marjorie Eimann because of the death of Sandra Black.

In determining damages for elements b and c, you may consider the nature of the relationship between Sandra Black and her mother, and their common interests and activities. You are reminded that elements b and c, like the other elements of damages, are separate, and, in awarding damages for one element, you should not include damages for the other.

Answer, with respect to the elements listed above, in dollars and cents for damages, that:

Were sustained in the past:

Answer: $200,000

In reasonable probability will be sustained in the future:

Answer: $200,000

If, in answer to Interrogatory 4, you have found that the negligence of the Omega Group, Ltd. and Soldier of Fortune Magazine, Inc. was gross negligence, then answer Interrogatory 7. Otherwise, do not answer Interrogatory 7.

Interrogatory 7:

What sum of money should be assessed against the Omega Group, Ltd. and Soldier of Fortune Magazine, Inc. as exemplary damages, if any, for the death of Sandra Black?

> "Exemplary damages" means an amount that you may in your discretion award as an example to others and as a penalty, or by way of punishment, in addition to any amount that you may have found as actual damages.
>
> Answer in dollars and cents for damages, if any.
>
> Answer: $7,500,000

After the jury was polled, the verdict was accepted and filed as a part of the record herein. Pursuant to the verdict, it is, therefore,

ORDERED, ADJUDGED, and DECREED that plaintiff, Gary Wayne Black, have and recover from Soldier of Fortune Magazine, Inc. and Omega Group, Ltd., jointly and severally, compensatory damages in the amount of $1,500,000, plus prejudgment interest calculated on past damages at the rate of 10% per annum, compounded daily from August 21, 1985 until the date of this judgment.

It is further ORDERED, ADJUDGED, and DECREED that plaintiff, Marjorie A. Eimann, have and recover from Soldier of Fortune Magazine, Inc. and Omega Group, Ltd., jointly and severally, compensatory damages in the amount of $400,000, plus prejudgment interest calculated on past damages at the rate of 10% per annum, compounded daily from August 21, 1985 until the date of this judgment.

It is further ORDERED, ADJUDGED, and DECREED that Marjorie A. Eimann and Gary Wayne Black have and recover from Soldier of Fortune Magazine, Inc. and Omega Group, Ltd., jointly and severally, the amount of $7,500,000 in exemplary damages.

It is also ORDERED, ADJUDGED, and DECREED that Marjorie Eimann, as representative of the estate of Sandra Kay Black, have and recover from Soldier of Fortune Magazine, Inc. and Omega Group, Ltd., jointly and severally, $5,714.97 as the stipulated amount for funeral and burial expenses, plus prejudgment interest on said amount at the rate of 10% per annum, compounded daily from February 21, 1985 until the date of this judgment.

It is further ORDERED, ADJUDGED, and DECREED that this judgment shall bear interest at the rate of 10% per annum from the date of the judgment until paid.

It is further ORDERED, ADJUDGED, and DECREED that all costs of court expended or incurred in this case are hereby adjudged against the defendants, Soldier of Fortune Magazine, Inc. and Omega Group, Ltd., jointly and severally.

All writs and process fees for the enforcement and collection of this judgment or the costs of court may issue as necessary.

This is a FINAL JUDGMENT.

All other relief not expressly granted herein is denied.

SIGNED this 22nd day of March, 1988.

/s/ DAVID HITTNER
Judge Presiding

APPENDIX C

Marjorie A. EIMANN, Individually, as Next Friend of Gary Wayne Black, and as Representative of the Estate of Sandra Kay Black, Deceased, and Glenn G. Eimann, Plaintiffs,

v.

SOLDIER OF FORTUNE MAGAZINE, INC., and Omega Group, Ltd., Defendants.

Civ. A. No. H-87-0030.

United States District Court, S.D. Texas, Houston Division.

March 8, 1988.

Mother and son of deceased brought negligence action against publishers of magazine which ran personal advertisement through which husband of deceased contracted to have deceased murdered. On publishers' motion to dismiss or for summary judgment, the District Court, Hittner, J., held that: (1) First Amendment protection of commercial speech did not preclude action; (2) special relationship did not have to exist between publishers and deceased's mother and son to impose duty on publishers; and (3) genuine issue of material fact existed as to whether criminal acts of husband and killer were foreseeable result of publishers' alleged negligence.

Motion denied.

Ronald G. Franklin, Graham Hill, Hill, Parker, Franklin, Cardwell & Jones, Houston, Tex., for plaintiffs.

Larry D. Thompson, Lorance & Thompson, Houston, Tex., Robert M. Callagy, Satterlee, Stephens, Burke & Burke, New York City, Robert B. Miller, Miller, Hale & Harrison, Boulder, Colo., for defendants.

MEMORANDUM OPINION AND ORDER

HITTNER, District Judge.

This is a wrongful death and survival action. Plaintiffs Marjorie A. Eimann and Gary Wayne Black are suing in this capacity as the mother and son of the deceased, Sandra Black. Former Plaintiff Glenn G. Eimann, father of the deceased, has non-suited.

In 1984, Defendant Soldier of Fortune ran personal services advertisements which Plaintiffs allege were thinly veiled offers of the services of hit men. John Wayne Hearn placed one of the ads. The ad read as follows:

> EX-MARINES—67-69 'Nam vets—ex-DI-weapons specialist—jungle warfare, pilot, M.E., high risk assignments U.S. or overseas. (404) 991-2684.

Robert Black, Jr., contacted Hearn through the advertisement, and, eventually, arrangements were made for Hearn to murder Black's wife Sandra. Hearn murdered Sandra Black on February 21, 1985.

Plaintiffs allege that Defendants Soldier of Fortune Magazine, Inc., and Omega Group, Ltd., were negligent in publishing the advertisement and in failing to investigate the nature of the ad. Soldier of Fortune and Omega

seek dismissal of Plaintiffs' suit or summary judgment in their favor on three grounds:

(1) The first amendment's protection of commercial speech prohibits the imposition of liability upon the publisher for the publication of the ad.

(2) The publisher owed no duty of care to Plaintiffs.

(3) The injuries resulted solely from the intervening intentional criminal acts of third persons and, therefore, as a matter of law, were unforeseeable.

This Court concludes that neither dismissal nor summary judgment is appropriate in this case for the reasons set forth below.

A. *First Amendment Protection*

Defendants assert that, by virtue of the protection of the first amendment of the United States Constitution, they cannot be held liable for the consequences of the publication of the Hearn advertisement. Defendants concede that the advertisement forming the basis of this suit is commercial speech.[1] Defendants further concede that if the ad in question expressly proposed unlawful activity, it would enjoy no first amendment protection. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 563-64, 100 S. Ct. 2343, 2350, 65 L.Ed.2d 341 (1980). Defendants maintain, however, that because

1. Commercial speech is speech related solely to the economic interest of the speaker and his audience, *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561, 100 S. Ct. 2343, 2348-49, 65 L.Ed.2d 341 (1980), and does no more than propose a commercial transaction: *Id.* at 562. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385, 93 S. Ct. 2553, 2558-59, 37 L.Ed.2d 669 (1973).

the ad in question does not expressly propose illegal conduct on its face, it does not fall within the "unlawful activity" exception; it therefore constitutes protected speech, thus foreclosing a negligence action based on its publication. This Court disagrees. To accept Defendants' contention would afford to commercial speech a broader protection than that given to core speech.[2]

It is axiomatic that commercial speech, although enjoying some degree of first amendment protection, is not entitled the stringent protection afforded to core speech. *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 505-07, 101 S. Ct. 2882, 2891-92, 69 L.Ed.2d 800 (1981); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 69 n. 32, 96 S. Ct. 2440, 2452 n. 32, 49 L.Ed. 2d 310 (1976). Even when the cause of injury is core speech, a simple negligence action is permitted for libel and slander provided the plaintiff is not a public figure. *See Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345-47, 94 S. Ct. 2997, 3009-10, 41 L.Ed.2d 789 (1974). The Court should not foreclose a negligence action allowing recovery for the foreseeable results of the publishing of commercial speech when a negligence action is not foreclosed for the publication of allegedly libelous core speech. The Supreme Court has emphasized that " '[t]he publisher of a newspaper has no special immunity from the application of general laws.' " *Branzburg v. Hayes,* 408 U.S. 665, 683, 92 S. Ct. 2646, 2657-58, 33 L.Ed.2d 626 (1972) (citing *Associated Press v. NLRB,* 301 U.S. 103, 132, 57 S. Ct. 650, 655-56, 81 L.Ed. 953 (1937)).

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2. Core speech is that which contains "[i]deological expression" and is "integrally related to the exposition of thought." *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 779, 96 S. Ct. 1817, 1834, 48 L.Ed.2d 346 (1976) (Stewart, J., concurring).

[1, 2] A consideration of whether an advertisement on its face advocates unlawful conduct is only relevant in determining whether the commercial speech at issue is subject to regulation or outright prohibition. In the instant case, Plaintiffs do not seek to regulate commercial speech but only to recover damages for negligent publication. In such a case, the Court must balance the free speech concerns of the first amendment against the interest in allowing a plaintiff to proceed on a negligence theory. At least three courts have held that first amendment concerns do not preclude a negligence action where commercial speech is at issue. *South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc.*, 676 F.Supp. 346 (D. D.C. 1987); *Norwood v. Soldier of Fortune Magazine, Inc.*, 651 F.Supp. 1397, 1398-1402 (W.D. Ark. 1987); *Weirum v. RKO Gen., Inc.*, 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36, 40 (1975). This Court agrees that "[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act." *Weirum*, 539 P.2d at 40.

Defendants take issue with this position and argue that "the imposition of civil responsibility for damages would have an impact upon and indeed, act as a restraint on the defendants' exercise of their asserted first amendment rights." *Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199, 203 (S.D. Fla. 1979). The Court is mindful of the concern for the potential effect on the free expression of thought and thus emphasizes the narrowness of its holding in this case.

First, the Court's holding is meant to apply only to the effects of commercial speech and not to those of core speech. The compelling interest in protecting the right of

the public to receive ideas dictates that first amendment protection of core speech should not be eliminated simply because the publication of an idea creates a potential hazard.[3] *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1020 (5th Cir. 1987). Rather, the public is sufficiently protected from dangerous core speech by the elimination of protection of that speech when it incites imminent lawless activity and is likely to produce such activity. *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829, 23 L.Ed.2d 430 (1969); *see, e.g., Herceg v. Hustler Magazine, Inc.*, 814 F.2d at 1022. In contrast, there can be "little concern that 'regulation' by way of a negligence cause of action will chill . . . expression or diminish the free flow of commercial [speech]." *South Carolina State Ports Authority, supra* at 350.

Further, this Court's decision is not intended to place upon every publisher an undue burden of investigation into the nature of every advertisement submitted for publication. It is intended only to permit a cause of action for negligence; the standard of reasonable care governs the degree to which investigation is required. The publication, without investigation, of the advertisement that is the subject of this suit in a city newspaper of general circulation in all likelihood would be unreasonable. The reasonableness of its publication in Defendants' magazine without investigation, however, is not clear given the nature of the magazine and its readership and given the fact that many advertisements submitted for publication

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3. The protection of the free flow of ideas is such a compelling interest that, even if core speech at issue results in the intentional infliction of emotional distress, it is protected by the first amendment when it concerns a public figure and is not libelous. *Hustler Magazine v. Falwell*, ____U.S.____, 108 S. Ct. 876, 99 L.Ed.2d 41 (1988).

in the personal services column expressly offered criminal services. The issue of the reasonableness of publication in the instant case, thus, presents a genuine question of material fact for the jury.

B. *Legal Duty*

[3] Defendants contend that even if a negligence action is not precluded by first amendment protection, such an action cannot be maintained because Defendants had no duty of reasonable care toward Plaintiffs since there was no special relationship involved. Defendants cannot prevail in this argument. Even absent a special relationship, there is a general duty to act as a reasonable person would act under the same or similar circumstances considering the reasonably foreseeable risk or probability of injury to persons similarly situated as the Plaintiffs. *Group Hosp. Servs., Inc. v. Daniel,* 704 S.W.2d 870, 877 (Tex. App.—Corpus Christi 1985, no writ). Again, the issue of whether, under the circumstances of this case, Defendant acted reasonably in publishing the advertisement is a question for the jury.

C. *Foreseeability*

[4, 5] Finally, Defendants contend that Plaintiffs cannot maintain a negligence cause of action because the injuries resulting from the intervening intentional criminal acts of John Wayne Hearn and Robert Black severed the causal link between Defendants' alleged negligence and Plaintiffs' decedent's death. A defendant's negligence will not, however, be excused by an intervening criminal act when that criminal conduct is a foreseeable result of the defendant's negligence. *El Chico Corp. v. Poole,* 732 S.W.2d 306, 313-14 (Tex. 1987); *Nixon v. Mr. Property*

Management Co., 690 S.W.2d 546, 550 (Tex. 1985). The determination of the foreseeability of intervening criminal conduct rests with the jury. *El Chico, supra* at 314. Plaintiffs have produced some evidence that Soldier of Fortune has, in the past, published advertisements expressly offering criminal services. Hearn has testified in deposition that he estimated that 90 percent of the calls he received in response to his ad inquired about illegal activities. He further testified that he received three to five calls per day from persons wanting him to murder for hire. In light of that evidence, an issue of material fact has been raised as to whether Defendants knew or should have known of the nature of the advertisement and, thus, should have foreseen the likelihood that criminal conduct would ensue.

D. *Conclusion*

In conclusion, this Court holds that Plaintiffs' negligence action is not foreclosed by first amendment concerns. Neither is it barred because of an absence of duty to the Plaintiffs. Finally, the Court concludes that the causal connection between Defendants' alleged negligence and Plaintiffs' injury is not necessarily, as a matter of law, severed by intervening criminal conduct. It is therefore

ORDERED that Defendants' Motion to Dismiss or in the Alternative, Motion for Summary Judgment be, and is hereby, DENIED.

APPENDIX D

Set forth below is a sampling of personal service advertisements published in *Soldier of Fortune* magazine through September of 1984

CHARLES J. WILSON & ASSOC. Perform body guard. VIP escort courier, private collections, covert operations, domestic mercenary functions, child custody snatches, and bounty hunting. All personnel are experienced and competent in performing their required duties. Specializing in short-term high-risk assignments. Phone (404) 793-4596. 798-8053; office 724-2149. P.O. Box 5644, Augusta, GA 30906. [Px 39, tab 11].

WANTED: Automatic with silencer. Also, am civilian interested in short term venture. Louis Priest, P.O. Box 12077, Las Vegas, NV 89112. [Px 39, tab 22].

"DO'S ANYTHING" "Go's Anywhere", Joe (813) 522-5429. Cash only. [Px 39, tab 28].

MERC. FOR HIRE. Anything anywhere if the price is right. Send description to P.O. Box 5311 Falmouth, VA 22401. [Px 39, tab 29].

DEVIOUS, young, American man wants action, high risk dirty work. Does anything, travels anywhere, anytime. Contact: Pellucidar, Box 69, Black Earth, WI 53515. [Px 39, tab 31].

EX-MARINE, Vietnam vet, with devious, discreet mind, seeks dirty work. Anything, anywhere. P.O. Box 41051, Chicago, IL 60641. [Px 39, tab 34].

COURIER, SPECIAL SERVICES, 32, will deliver or do job (anything) anywhere. Current passport, 6 languages, total discretion. Booked until July 80, but after - any offer $20,000 or more is O.K. Write: Occupant, Suite 225, 438 South Broadway, Yonkers, NY 10706. [Px 39, tab 34].

MR. EMPLOYER: Ex-Ranger, 3 years Vietnam, will do anything for money, from bodyguard to ?. Call Earl (214) 579-0020, or write Earl M. Ward, 111 E. 7th St., Irving, TX 75060. [Px 39, tab 37].

MERCENARY FOR HIRE. Seeking dirty work anywhere. Military trained. Valid passport. Explosives, scuba and other talents. Serious inquiries. Write: Mike, P.O. Box 582, Marion, SC 29571. [Px 39, tab 38].

COURIER, escort and delivery functions provided. Anywhere, anything, anytime. No questions asked. J.R. Mon, Box 1684, Logan, WV 25601. [Px 39, tab 39].

FORMER SOG GROUPIE AVAILABLE. Some old Tea and Biscuit Company contacts as well as some PM activity. WM, 6', 202 lbs, 38. Physically fit, mentally courageous, morally questionable, philosophically strong. Will accept some Red, White and Blue work, domestic civilian/military, whatever. Usual disclaimer of no illegal work. Usual fees. Gaven, 256 So. Robertson, Beverly Hills, CA 90211. [Px 39, tab 40].

EMPLOYMENT WANTED - Will do any job, any where for right price, total discretion. Write Pope 2427 Pearl Lane, Apt. 2A Chambree, GA 30341. Send Telephone Number. [Px 39, tab 42].

EX-INTELLIGENCE TYPE wants high risk, cash only contracts. Will do anything in the U.S. Satisfaction guaranteed. Courier also. Sgt. T. 5120 Meadow Creek Drive, Austin, TX 78750, or call (512) 442-0618. [Px 39, tab 45].

EX-MARINE PILOT will do anything, anywhere at right price. Small arms expert. Discreet. Sam Dubyak, Box 5502, Inglewood, CA 90303. (213) 970-1203. [Px 39, tab 50].

MERC SEEKS SHORT TERM HI RISK Employment. U.S. Canada, South America preferred. Have no restrictions, work alone or small group. Expert small arms, demolition, land and personal security, infiltration. Other specializations too sensitive to print. All inquiries strictly confidential. STEIGER, Box 1493, Morgan City, LA 70381. Certified Mail, telephone number enclosed, ONLY. [Px 39, tab 53].

MERC FOR HIRE. Anything, Anywhere. Expert in small arms, demo, ambush, espionage. Annonymous, discreet, thorough. Money right, no questions asked. E. Randolph, c/o Hollywood Inn, 400 Route 109, E. Farmingdale, NY 11735 [Px 39, tab 57].

MERC FOR HIRE. Anything, anywhere. Price is right. Ten years military. 'Nam 66-67 & 70-71. Expert small arms, light weapons, demo, ambush, military intelligence. Contact BOB, P.O. Box 6067, Augusta, GA 30906. [Px 39, tab 57].

GUN FOR HIRE - X-Ranger & Mercenary - professional investigator - high risk contracts. Contact: Stringer, Box 19, Ascutney, VT 05030. [Px 39, tab 59].

MERC FOR HIRE. Seeks dirty work, anything, anywhere. Discreet, devious mind. P.O. Box 30107, Chicago, IL 60630. [Px 39, tab 64].

MERC FOR HIRE: 43, anything, anywhere, work alone, short-term only. Bounty Hunting. Will take commission job. JIM, P.O. Box 413, Fair Oaks, CA 95628. [Px 39, tab 66].

MAN FOR HIRE: Army Vet seeking short-term work. Most anything-make offer. JOE, P.O. Box 290, Clarendon Hills, IL 60415. [Px 39, tab 66].

MERC FOR HIRE. Anything, anywhere. Don't get mad, get even. Work alone, short term, discreet, confidential. SKIPPER, P.O. Box 546455, Surfside, FL 33154. [Px 39, tab 66].

WANTED WORK WITH MERCENARY. Will do anything - Dependable - Expert in submachine gun. DE VIDO W.P., Vio Alfierl 10, Fermo Posta H740151, Torino, Italy. [Px 39, tab 68].

EX-MILITARY FOR HIRE: Expert in weapons, demo., hand to hand. Do anything, anywhere; bounty hunting and courier work also. Contact: CONTRACT, 254 Summit Ridge Drive, Nashville, TN 37215. [Px 39, tab 69].

WANTED: High Risk adventures for appropriate pay. 913-462-3843. [Px 39, tab 69].

VIETNAM COMBAT MARINE, seeking short term work. Nothing too dirty, just ask. Contact THE ANT, P.O. Box 1553, Smithfield, NC 27577. [Px 39, tab 70].

No. 89-790

Supreme Court, U.S.
FILED
NOV 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARJORIE A. EIMANN, *et al.*,
Petitioners

v.

SOLDIER OF FORTUNE MAGAZINE, INC., *et al.*,
Respondents

On Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review, in a diversity case, the Court of Appeals' reading of Texas law on torts.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The statement of the case by the Court of Appeals is entirely fair and sufficient to the purpose, and we will not repeat it here. We emphasize only a few points:

(a) The gentleman who placed the ad, Hearn, had no prior criminal record, gave his correct name, address and telephone number in the letter accompanying the ad, met all of the qualifications in the ad, and testified that he had no criminal purpose in placing the ad. Therefore, an investigation of him by SOF would have produced nothing, and, in fact, petitioners conceded below that they were not asserting a duty on the part of SOF, before publishing, to investigate the ad in any way.

(b) The ad itself had a lawful meaning and sought lawful services. Petitioners' expert at trial attempted a

construct of "code" words that he hoped would reveal hidden meanings in the ad, and he had to abandon the project; he could not make it work.

(c) The first contact as a result of the ad between Hearn and the murdered woman's husband, Black, did not concern a crime but a job. After a number of calls, the subject of conversation turned to Black's gun collection. It was *three months* after the first call before Black even "hinted" about a murder, and it was *five months* before Black finally made up his mind to perform the deed. A perfectly legitimate response to the ad turned into a crime after an entire sequence of intervening events.

(d) The jury did not find that the ad was an invitation to crime. The court's instruction asked whether the ad was "related to criminal activity" and whether SOF knew or should have known from the face "or the context" of the ad that it could reasonably be interpreted as an offer to engage in illegal activity. "Relate to" was never defined, and "context" was defined as including "the nature of the magazine, its other advertisements and articles, the nature of its readership, and the magazine's knowledge, if any, that other advertisements in the magazine could reasonably be interpreted as an offer to engage in illegal activity."

REASONS FOR DENYING THE WRIT

The Questions Presented pose no federal issues. No constitutional or statutory provision is referred to. Each question, even if answered in the affirmative, would not properly involve this Court's jurisdiction.[1]

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[1] The reference to the Seventh Amendment on the last page of the petition, Pet. 19, is not part of the Questions Presented and for a good reason: it was not raised in the Court of Appeals and thus comes too late. In any event, the Court of Appeals did not reverse a factual finding by the jury but instead ruled that, under Texas law, the ad on its face placed no duty on SOF not to publish.

The Questions Presented aside, the court below did not decide a federal question.

The brief for Soldier of Fortune ("SOF") in the Court of Appeals was essentially divided into two sections—one presenting purely state law questions, such as duty, standard of care, proximate cause, intervening circumstances, and the like,[2] and the other presenting First Amendment issues.

SOF's counsel began his argument in the Fifth Circuit by stating that while the case posed serious First Amendment questions, the court need not reach them.

And the court did not. It began its opinion by noting that petitioners "presented this case as a straightforward negligence action * * *," and the court then stated: "We need not address SOF's first amendment attacks on the judgment to resolve this appeal." App. 8a (footnote deleted). Again, after detailing some of SOF's First Amendment claims in a footnote, the court concluded, "We need not confront these issues * * *." App. 8a n.1.

The Court of Appeals, relying on six Texas cases and two treatises on torts, found as a matter of state law that "SOF owed no duty to refrain from publishing a facially innocuous classified advertisement * * *." App. 8a-9a. Again, after citing "Texas law", App. 9a, and what "Texas courts" have ruled, App. 10a, the Fifth Circuit concluded that "* * * SOF did not violate the required standard of conduct * * *." App. 8a.

The reason why some of this Court's commercial speech cases were mentioned was carefully set forth by the Fifth Circuit: "While *we do not reach SOF's first-amendment arguments*, the Supreme Court's recognition of limited first amendment protection for commercial speech nonetheless highlights the important role of such communication for purposes of risk-benefit analysis." App. 14a

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[2] SOF cited to and relied upon 25 Texas cases in its brief on appeal.

(emphasis added). In other words, the importance of commercial speech, as spelled out by this Court, was part of the "Balancing the Burdens and Risks" undertaken by the Fifth Circuit in applying Texas law. App. 17a.[3]

What petitioners really object to is the Fifth Circuit's interpretation of Texas law ("* * * the analysis employed did not reflect views held by Texas courts," Pet. 11). While, of course, this Court has the constitutional power to oversee a Court of Appeals' interpretation of state law in a diversity case such as this one, there is no need for such an extraordinary use of its powers here. Not only would the Court reach the same result as a matter of Texas law, but even if it did not, it would surely conclude on First Amendment grounds that the judgment below must be affirmed.[4]

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[3] The court's interpretation of Texas law was entirely consistent with that in other States. In fact, in other States this case would not even have gone to trial but would have been decided by dismissal or summary judgment. *See, e.g., Yuhas* v. *Mudge*, 129 N.J. Super. 207, 322 A.2d 824 (App. Div. 1974) (publisher has no duty to investigate advertised dangerous products; summary judgment affirmed); *Walters* v. *Seventeen Magazine, Inc.*, 195 Cal.3d 1119, 241 Cal. Rptr. 101 (Ct. App. 1987) (same; dismissal affirmed); *Pittman* v. *Dow Jones & Co.*, 662 F. Supp. 921, 923 (E.D. La.) (no duty to investigate fraudulent ad; summary judgment), *aff'd*, 834 F.2d 1171 (5th Cir. 1987).

[4] For example, this Court would never countenance a jury being allowed to judge a single advertisement by reference to the publisher's "readership", those who attended its conventions, its articles and photographs, and even its editorials, as this jury was allowed to do. Nor would this Court allow a jury to single out this particular, controversial magazine for damages when petitioners' own expert and their counsel conceded that the same advertisement in other periodicals would not result in liability. This is precisely the type of content-directed restriction on speech that this Court has repeatedly struck down. *E.g., Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987); *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984); *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95, 98-99 (1972); *Carey* v. *Brown*, 447 U.S. 455, 462-463 and n.7 (1980).

CONCLUSION

For each of these reasons, the petition should be denied.

Respectfully submitted,

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